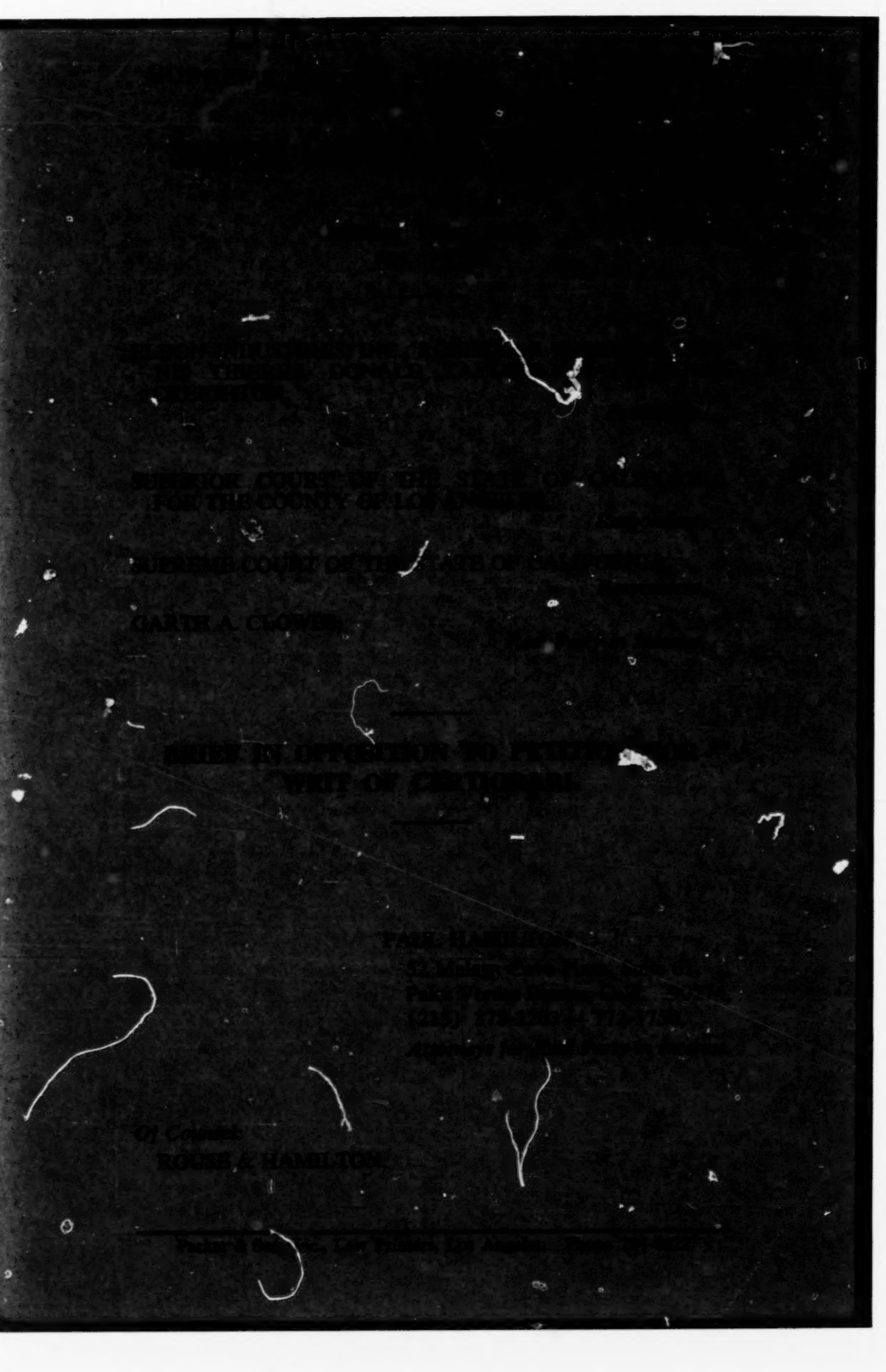

SUBJECT INDEX

I. Page

Factual Summary 1

II.

Jurisdiction 6

III.

Merits of the Petition for Writ of Certiorari 7

A. The Law Applicable 7

B. The Records Ordered to Be Produced Are Specified With More Than Reasonable Particularity 13

C. Clowes' Sixty Four Page Declaration Filed in Connection With the Superior Court's Order Establishes More Than an Ample Showing of Good Cause 21

D. The Burden Cast Upon Eldon to Produce the Documents Ordered Produced Is One of Its Own Making 22

IV.

The Denial of a Hearing Before the California Supreme Court Does Not Violate Eldon's Rights to Procedural Due Process 26

V.

The Within Petition, and the Stay of Execution Heretofore Sought by Eldon and Denial in This Court, Constitute Frivolous Acts for Which This Court Should Assess Double Costs and for Which This Court Should Assess Attorneys Fees Against Eldon 29

Conclusion 31

TABLE OF AUTHORITIES CITED

Cases	Page
American Manufacturers Mutual Insurance Co. v. American Broadcast-Paramount Theatres, Inc., 87 S. Ct. 1	7
Citizens Utilities Co. of California v. Superior Court, 31 Cal. Rptr. 316	25
Ellis v. Dixon, 949 U.S. 358, 75 S. Ct. 850	6
Founding Church of Scientology v. United States, 409 F. 2d 1146	8, 9
Greyhound Corporation v. Superior Court, Merced County, 15 Cal. Rptr. 90	10, 12, 22
Head v. New Mexico Board of Examination in Optometry, 374 U.S. 424, 83 S.Ct. 1759	6
Johnson v. U.S., 68 S. Ct. 367, 337 U.S. 10	8, 9
Lapides v. Clark, 176 F. 2d 619	27
Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469	27
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093	28
Schaeffer v. The Municipal Court, 67 Cal. Rptr. 479	25

Rules	
Rules of the Supreme Court of the United States, Rule 56(4)	31

Statutes	
United States Code, Title 28, Sec. 2211	7
United States Constitution, Fourth Amendment	13

IN THE

Supreme Court of the United States

October Term 1970
No. 1527

ELDON INDUSTRIES, INC., ROBERT SILVERSTEIN, DENNIS TIBERIIS, DONALD TAYLOR and TERRENCE CREIGHTON,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

SUPREME COURT OF THE STATE OF CALIFORNIA,

Respondent,

GARTH A. CLOWES,

Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.
Factual Summary.

This Brief is filed on behalf of the Real Party in Interest, Garth A. Clowes (referred to as "Clowes"), in opposition to the Petition for Writ of Certiorari heretofore filed by Eldon Industries, Inc., Robert Silverstein, Dennis Tiberiis, Donald Taylor and Terrence Creighton (all of whom will hereafter be referred to collectively as "Eldon"), in connection with the Order of Respondent, Superior Court of the County of Los Angeles for the State of California (hereinafter referred to as "Superior Court"), ordering Eldon to produce

documents pursuant to a Motion to Compel production if such documents filed by Clowes and directed to Eldon.

Clowes contends herein, and will demonstrate hereafter, that no constitutional right of Eldon has been infringed, or threatened to be infringed, through the operation of the Order compelling production of the documents ordered produced, and the decisions thereafter of the California Appellate Courts affirming such Order.

The substantive facts upon which the action between Eldon and Clowes is based arises out of a Complaint filed in the Superior Court by Eldon against Clowes alleging that Clowes had breached a duty of trust and confidence owed to Eldon, as its former general manager, officer and director in wrongfully using certain of Eldon's alleged trade secrets in a competing business enterprise. [Ex. "B" to Eldon's Application for Stay of Execution to this Court]. Clowes himself stoutly denies any such allegations of wrongdoing. [Ex. "C" to Eldon's Application for Stay of Execution to this Court.] After such action was filed by Eldon against Clowes, Clowes filed a Cross-Complaint in the Superior Court against Eldon and the other Petitioners herein claiming, in essence, that Eldon and such Petitioners conspired to wrongfully defame Clowes to persons with whom Clowes desired to do business in the toy industry, and also wrongfully induced one or more suppliers of toys and related products located in the Orient to terminate contractual and business relationships they had theretofore entered into, or were seeking to enter into, with Clowes and a corporate entity with which Clowes was associated. [Ex. "D" to Eldon's Application for Stay of Execution to this Court.]

Eldon states in its Factual Summary on page 2 that:

> "The success of Eldon's business depends on its ability to develop new and unique toys. To some extent ideas for new marketable toys and toy concepts are developed and generated within its toy division. Other substantial contributions come from toy suppliers, including toy suppliers located in Japan and elsewhere. Ordinarily, Petitioner and its Asian suppliers work in a close and confidential relationship. The ideas, concepts, developments, manufacturing and marketing procedures generated to and from Eldon are maintained secret and are the valuable trade secrets of Eldon."

Such a statement constitutes, at best, and allegation on the part of Eldon and does not in any manner constitute an established fact as between Eldon and Clowes. In this light, the Court will note from the allegations of the Complaint and the Answer thereto that it is the essence of the law suit as to whether or not, and to what extent, Eldon has any trade secrets of any nature whatsoever which it is entitled to bar Clowes from using, including the use by Clowes of Eldon's purported sources of supply of toys and related products, and ideas and concepts related thereto, located in Asia and anywhere else in the world.

It is Clowes' position that none of such suppliers constitute in any manner a protectible interest to Eldon that it may assert to the exclusion of use of the same by Clowes. Eldon goes on to state in its Factual Summary on page 2 that:

> "Clowes was a valuable employee of Petitioner Eldon's, and as general manager of Petitioner's toy division, Clowes was responsible for the de-

velopment, procurement, manufacture, exploitation and distribution of Eldon's toy products. In discharge of his employment duties Clowes worked closely with Eldon's Japanese suppliers, particularly Tomy Kogyo Company, Inc., and was entrusted with confidential and secret information relating to new and unique toy ideas developed between Petitioner and Tomy Kogyo Company, Inc. Clowes was also Vice President of Eldon and a member of Eldon's Board of Directors."

There is no question that Clowes was a Vice President and Director of Eldon, and was general manager of its toy division. Clowes is also elated to learn that Eldon believes that he was a valuable employee during the time of his employment. Clowes also recognizes that as general manager of Eldon's toy division, he had ultimate, if not intimate, responsibility for the development, procurement, manufacture, exploitation and distribution of Eldon's toy products.

Clowes denies herein, as he has in his Answer to the Complaint that any business and/or contractual relationship in which he entered into, or was seeking to enter into, relating to Eldon's suppliers involved a breach of any fiduciary duty owed by Clowes to Eldon Industries, Inc.

Eldon states on page 3 of its Factual Summary that:

"On March 31, 1969, Clowes terminated employment with Eldon and since this date, Clowes has directly competed with Eldon, utilizing all the information, facts, ideas, concepts and secrets of Eldon that were learned by Clowes while in a position of trust and confidence with Eldon and as its general manager."

Clowes readily concedes that his employment with Eldon was terminated on March 31, 1969, and stoutly contends that he has not thereafter utilized any of Eldon's protectible "information, ideas, facts, concepts" and alleged "secrets of Eldon" that were purportedly learned by him as Eldon's general manager.

In this connection, it is to be noted, however, that Eldon alleges (albeit in the Brief as a statement of proven fact), in the Factual Summary on page 3 that since March 31, 1969, Clowes has wrongfully utilized "all the information, facts, ideas, concepts and secrets of Eldon that were learned by Clowes . . . as its general manager". Thus, the real issue extant to the proceedings occurring in the lower courts, and that which becomes the predication for the lower court's Order compelling production of documents in this case is apparent. Clowes seeks to discover through the documents that have been ordered to be produced the precise and specific factual predication upon which Eldon claims that "the information, facts, ideas, concepts and secrets of Eldon" have, in fact, been used by Clowes to Eldon's detriment, and the factual basis upon which Eldon claims any of such information, facts, ideas, concepts, and secrets are, in fact, protectible in law to the exclusion of use of the same by Clowes.

It is also true as Eldon states in its Factual Summary on page 3 that on April 15, 1970, Clowes served a Motion to Compel Production of Documents on Eldon requesting the production of the documents specified therein. However, Eldon fails to disclose to this Court that Clowes' original Application for production of documents was thereafter modified by Clowes wherein a substantial number of documents were elimi-

nated from Clowes' original request, all of which will bear upon the merits of Eldon's Petition as hereafter set forth.

Subsequent to such modification, on October 26, 1970, the Superior Court ordered the production of such documents, which Order has now become the subject of this Petition. Clowes agrees with the statement of affairs occurring after October 26, 1970, in the various Appellate Courts of the State of California, as set forth at the bottom of page 3 and the top of page 4 in Eldon's Petition. However, it should be noted that Eldon also applied for a Stay of Execution of the Superior Court's Order before the Trial Judge who determined the matter, and such Stay was granted for a period of fifteen days pursuant to Stipulation of Clowes' counsel, whereupon a further Stay of Execution of such Order was applied for before Mr. Justice Douglas of this Court, whereupon such Application was denied.

II.
Jurisdiction.

It is respectfully submitted that the jurisdiction of this Court should not be invoked to hear this matter for the reason that the purported issue of the "unreasonable search and seizure" thrust upon Eldon by reason of the Superior Court's Order was not raised by Eldon until after their Petition for Writ of Prohibition to the California District Court of Appeal was denied, at which time the alleged constitutional issue of "unreasonable search and seizure" was raised to the California Supreme Court. *Ellis v. Dixon* (1955), 949 U.S. 358; 75 S. Ct. 850 and *Head v. New Mexico Board of Examination in Optometry* (1963), 374 U.S. 424, 83 S. Ct. 1759.

It is also respectfully urged that there is no "substantial" federal constitutional question raised with regard to the Superior Court's Order compelling production of documents, and as such, jurisdiction of this Court should not be assumed. *American Manufacturers Mutual Insurance Co. v. American Broadcast-Paramount Theatres, Inc.*, 87 S. Ct. 1, 1966.

In this connection, a review of the briefs heretofore filed by Clowes and Eldon in the Superior Court, the California District Court of Appeal, and the California Supreme Court, will disclose through such Briefs and the record in the Trial Court below, that Eldon's position with regard to the claimed lack of good cause, and specificity on the part of Clowes in setting forth the documents to be produced, is wholly untenable.

While Clowes' position herein is that the Superior Court did not commit error in rendering the Order herein under attack, assuming, *arguendo*, that any part of such Order, or California Appellate Court affirmance thereof, might be deemed by this Court to be erroneous, such error is not, and would not be, substantial enough to require this Court's reversal to the same. *28 United States Code 2211.*

III.
Merits of the Petition for Writ of Certiorari.

A. The Law Applicable.

An examination of the Briefs filed heretofore by Eldon and Clowes in the Superior Court, the California District Court of Appeal, the California Supreme Court, and to Mr. Justice Douglas of this Court (in the Application for Stay of Execution heretofore filed by Eldon and denied by Mr. Justice Douglas), willfully disclose whether or not a substantial federal ques-

tion was, or is, raised by Eldon, with regard to the purported "unreasonable search and seizure" claimed by Eldon to emanate from the Superior Court's Order.

Before addressing the cases cited by Eldon, the underlying legal predication for Eldon's asserted claim of "unreasonable search and seizure" must be examined. In determining whether the "search and seizure" provisions of the Fourth Amendment have been violated (as provided for through the operation of the Fourteenth Amendment in the case of State action), this Court, as has the California Supreme Court in its decisions on the issue, has indicated that *the prime issue in question is whether or not adequate safeguards have been provided to insure that any so-called "search and seizure" is not unreasonable. Johnson v. U.S.*, 68 S. Ct. 367, 337 U.S. 10 (1947). In setting forth the opinion of this Court relating to the means by which such protection is afforded through the requirement of judicial action, Mr. Justice Jackson stated on page 369 of 68 S. Ct. as follows:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . .*" (Emphasis added).

The view of this Court has been more recently expanded upon by the Court of Appeal in the District of Columbia Circuit, in the case of *Founding Church*

of Scientology v. United States (U.S.C.A., D.C. 1969), 409 F. 2d 1146, wherein Circuit Judge Wright stated, on page 1150 of 409 F. 2d that:

> "The Fourth Amendment protects 'the right of the people to be sure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures.' It gives procedural form to this sweeping protection through the warrant clause, which requires that a magistrate review the decision to arrest or search except in exigent cases. *The often stated purpose of this requirement is to interpose a relatively detached and independent decision maker between the privacy of the individual and the otherwise unchecked zeal of enforcement officials.*" (Emphasis added).

The Superior Court in the instant case did exactly just what has been required by this Court in the *Johnson* case, and what was required by the District Court of Appeal in the *Founding Church of Scientology* case. The record below will reflect that the Motion to Compel Production of Documents was duly considered for a period of more than six months by the Trial Judge, thereby indicating that the Trial Court gave due, ample and very concerned consideration to the contentions of the Applicants as related to the purported failure to show "good cause" and "specify" documents. [Ex. "2" to Clowes Opposition to Eldon's Application for Stay of Execution to this Court, p. 13, lines 8-22.]

While the two cases cited above deal only with a factual situation involving search warrants, the Supreme Court of the State of California has set forth the requirements imposed upon a Trial Court in deter-

mining whether or not sufficient "good cause" has been shown in the case of production of documents.

With regard to the element of "good cause", the California Supreme Court has set forth the requirements imposed upon a Trial Judge through the applicable California Code Provisions relating to production of documents, in the case of *Greyhound Corporation v. Superior Court, Merced County,* 15 Cal. Rptr. 90, wherein the California Supreme Court stated on page 111 of 15 Cal. Rptr. as follows:

> "The present statutes, however, provide that an order requiring a party to submit to inspection of material in his possession or control may only be made for good cause, shown on motion heard after notice to such party. It is further provided that in making such order the court shall exercise a wide discretion in the application of any number of procedures intended to protect the parties against abuse, oppression or any other alleged injustice. Thus, the statute has adequately provided for protection against the *unreasonableness* of the search or seizure. The California Constitution only prohibits 'unreasonable' seizures. Reasonable searches are permitted. One such 'reasonable' search is by means of a search warrant. But just as search warrants are justifiable on the showing of good cause (and the provision of other protective procedures), so an order for the inspection of material in a civil case is reasonable when similar provision is made."

The Court then goes on to define for the benefit of the Trial Court the factors to be weighed in exercising

the Court's discretion in granting or denying discovery, by stating on page 103 of 15 Cal. Rptr. that:

> "To predicate appellate review on the hypothesis that such an exercise of discretion may not be disturbed, is to overlook the purpose of the discovery statutes. If discovery is to serve its intended purpose, the manner of exercising discretion must be given greater consideration at both the trial and appellate level. Certainly, in some cases, consideration should be given to the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances. With such considerations in mind, the court may grant the request in full or in part. It may grant subject to specified limitations which it finds proper to impose. And it may, when necessary, deny in toto. . . ."

A review of the Motion to Compel Production of Documents filed on behalf of the Respondent in the Trial Court, which is attached to the Applicant's Brief as Exhibit "E" will clearly disclose that the sixty four page Declaration of Clowes filed concurrently therewith amply supports good cause for the production of the documents requested, and specifically designates such documents so as to enable any custodian of records in possession of the same to identify them and relates to specific relevant time periods.

Moreover, *Eldon's Opposition to Clowes' Motion to Compel Production of Documents* [attached as Ex. "F" to the Applicants' moving papers], *makes no showing whatsoever by Affidavit or Declaration that any real "trade secret" exists with regard to the subject matter of any of the documents ordered produced. Additionally, other than bold conclusionary assertions, nowhere does Eldon set forth facts, by Affidavit or Declaration, which would disclose to the Trial Court the manner and extent to which a burden or oppression is cast upon Eldon with regard to the production of any documents ordered produced. The record will also disclose that a number of hearings took place before the Trial Judge during the six month period elapsing in which the Motion was under consideration,* where additional matters were brought to the attention of the Trial Judge, other than those set forth in the Briefs of the parties. Yet, Eldon would seek to cause this Court to believe that its rights, to the extent that such exist, against "unreasonable search and seizure" have been violated. *As is set forth in the Greyhound case, above, the ultimate test is whether or not the search and seizure is reasonable.* Surely, a well-documented Motion to Compel Production of Documents, lengthy opposition papers in regard thereto filed by Eldon, numerous hearings related to determination of the Motion by the Trial Court, and the lengthy period of time in which the matter was under consideration by the Trial Court, would create the presumption that the Trial Court acted reasonably in affording Eldon all

the protection which Eldon's showing before the Court entitled it to receive.

Without conceding at this point in time that Eldon's contention that the Order to Produce documents comes within the scope of an "unreasonable search and seizure" as contemplated by the Fourth Amendment of the United States Constitution, it is to be noted that the *Camara, United States v. Undetermined Quantities of D. of S. Drugs and See v. City of Seattle* cases cited by Eldon involve a criminal prosecution relating to a search (and subsequent seizure) of physical things on private premises by governmental agents, acting without the benefit of a search warrant. Such cases are inapposite to the instant case for the reason that good cause has been shown by Clowes in his moving papers before the Trial Court in the instant case, as opposed to an entire failure by the governmental agency to comply with the element of "probable cause" in failing to obtain a search warrant in the above cases cited by Eldon.

B. The Records Ordered to Be Produced Are Specified With More Than Reasonable Particularity.

Eldon contends on pages 7, 8, 9 and 10 of its Petition that Clowes has not specified the documents ordered to be produced with sufficient "reasonable" particularity. In advancing such contention, Eldon sets forth an excerpt from Paragraph III of Clowes' Motion to Compel Production of Documents, which is set forth again hereafter for the purpose of illustrating that each of such documents requested therein is easily iden-

tifiable and described with more than reasonable particularity. Such excerpt as is so utilized by Eldon for the purpose of illustration is:

> "1. For the period January 1, 1962, through and including March 31, 1969.
>
> A. Such correspondence and agreements as related to the above subject matter shall include, but not be limited to the following:
>
> (1) All correspondence and agreements wherein the word 'confidential' and/or 'proprietary' or words of similar import and effect are affixed thereto or stamped thereon, including but not limited to all correspondence in the possession of Eldon received from any source whatsoever, including its employees, officers, agents and/or directors, wherein such words as are described above are affixed or stamped thereon.
>
> (2) All purchase orders issued by Eldon to its sources of supply and/or vendors for the purchase of products, products components, services, raw materials, machinery, molds, tools, dies and/or services.
>
> (3) All correspondence between Eldon, on the one hand, and its sources of supply, on the other hand.
>
> (4) All agreements between Eldon, on the one hand, and its sources of supply, and vendors, on the other hand.
>
> (5) All correspondence between any employees, officers, directors and agents of Eldon."

As related to the foregoing excerpts in Paragraph I A (1), Clowes in essence asked for all correspondence and agreements where the word "confidential" and/or "proprietary", or words of similar import and

effect are affixed thereto or stamped thereon. Query—What custodian of records would be unable to find such documents especially in view of the fact that Eldon contends in its Complaint that all matters relating to "every fact and facet" of its business are confidential nd therefore constitute a protectible trade secret to the exclusion of use of the same by Clowes? In answer to the question, the Custodian of Records would only be required to produce any documents which have stamped thereon "confidential and/or proprietary". Either such documents exist or they don't, and there is no ambiguity whatsoever in the fact of whether or not such documents exist, or can be identified.

The next category requested by Clowes in Paragraph I A (2) requests "all purchase orders issued by Eldon to its sources of supply and/or vendors for the purchase of products, product components, services, raw materials, machinery, molds, tools, dies and/or services". Such a description surely is sufficient to enable the custodian of records to identify such purchase orders. However, as stated above, Eldon has failed to advise this Court that Clowes' modification of such request, and the Order of the Superior Court incorporating such modification, only embraced purchase orders issued by Eldon to six of its sources of supply, namely: Tomy Company, Inc., Tomy Kogyo Co., Inc., Konryu Trading Co., Bandai Company, Ltd., Mabuchi Co. Ltd., and Toytown Corporation.

Paragraph I A (3) of Clowes' Request seeks "all correspondence between Eldon, on the one hand, and its sources of supply, on the other hand". Again, such correspondence is specifically identifiable by any person who would have custody of such correspondence. Once again, however, this Court has not been advised

by Eldon that the request for such correspondence as is related herein was limited by Clowes to the same six suppliers as are set forth above.

The fourth request to which Eldon alludes in which it claims that Clowes has not described the same with reasonable particularity is that contained in Paragraph 1 A (4) requesting "all agreements between Eldon, on the one hand, and its sources of supply and vendors, on the other hand." Once again, what custodian of documents so purportedly vital to Eldon's very existence (as Eldon contends in its Complaint and in this Petition) as agreements with its sources of supply would not be able to locate the same? Eldon has again also ignored the fact that such request was again limited to the same six suppliers as are referred to above.

The last of such specific references that is made by Eldon is the request made in Paragraph I A (5) wherein Clowes asked for "all correspondence between any employees, officers, directors and agents of Eldon". Surely the custodian of such correspondence could readily identify any employees, officers, directors or agents of Eldon without the need for further specification of particularity. However, in alleviation of the alleged burden cast upon Eldon, such request was again limited to the same six suppliers referred to above.

Eldon then goes on to state that:

> "In Paragraph II of Clowes' Motion, there are no less than forty (40) such generally described demands for production of documents. Further Paragraph III is only one of nineteen of such paragraphs demanding the production of similarly described documents. The court can clearly see that the search would require a complete and com-

prehensive search of all documents of any nature in Petitioners business from the period 1962 through 1970".

Assuming, *arguendo,* that such request as made by Clowes would in any manner involve a "complete and comprehensive search" of documents by Eldon, it is still also equally clear to this Court that there has been no specification whatsoever by Eldon before any Court, including the Superior Court, of why and in what manner the documents requested will involve such an alleged "complete and comprehensive search" other than the conclusionary declaration of William Lear, Eldon's general counsel and custodian of records, filed in connection with Eldon's opposition before the Superior Court to Clowes' Motion to Compel Production of Documents. Thus, there is no factual support whatsoever for Eldon's claims that the production of documents requested will require a "complete and comprehensive search of all documents of any nature in Petitioner's business from the period 1962 to 1970."

But once again, Eldon has not disclosed to this Court that all of the documents requested in Paragraph II, with the exception of Items 32, 33, 35, 44, 45, 46, 49 and 51, are limited to the same six suppliers as are referred to above, excepting that in sub-paragraphs 12, 13, 14, 15 and 17, such correspondence also embraces Eldon of Canada, Ltd., a corporate subsidiary of Eldon and a party cross-defendant in the Cross-Complaint filed in the Superior Court.

Eldon has also not disclosed that the period of time involved in the documents requested in Paragraph III 1. (A) (1), (2), (3) and (4) are limited to the years 1968 through and including September 8, 1969. More-

over, the documents requested in sub-paragraphs (27), (28), (29), (30), (31) and (51) are limited to the years 1967 through and including September 8, 1969, and the documents requested in subparagraphs (35) are limited to the years 1968 through and including September 8, 1969.

Thus, the volume of documents that must necessarily be examined by Eldon is considerably reduced from that which it has inferred will necessarily become the subject of production pursuant to the Superior Court's Order.

Notwithstanding the foregoing, this Court may ask why, and on what showing, would the Superior Court order that such documents be produced? The answer is simple, and will be found in the visceral allegation of Eldon's Complaint which will disclose in the most sweeping and all-embracing terms that it contends that "every fact and facet" of its Twenty Million Dollar a Year toy operations constitutes a trade secret to the exclusion of use of the same by Clowes. Obviously, the burden cast upon Clowes in refuting such an allegation is nearly insurmountable, unless Clowes can elicit from Eldon the facts upon which it predicates such a sweeping claim.

The key allegations of the Complaint most illustrative of the foregoing are as follows:

> "ideas and concepts developed within the framework of Plaintiff's organization, as well as those developed by its suppliers are assets of its business and provide the foundation for success of Plaintiff's operations. That *it is essential to the success of Plaintiff's business that each and all of said ideas, concepts, developments, sources of supply, manufacturing procedures and marketing*

information, as well as information pertaining to costs in each respect be maintained secret. That all of the same are Plaintiff's valuable trade secrets. That *Plaintiff* has at all times herein mentioned *maintained its said trade secrets as secret and confidential.* That its *policies, practices and activities* in said respect are . . . *well known to each and every defendant (including Clowes).*" (Emphasis added). [p. 2, lines 7-18.]

Then Eldon goes on to allege that:

". . . Clowes and his co-defendants and each of them agreed to and were and now continue to be bound to protect Plaintiff's trade secrets and *all information pertaining to Plaintiff's business* for, and only for the use and benefit of Plaintiff." (Emphasis added.) [p. 3, lines 12-15.]

and that:

". . . *each and every fact and facet pertaining to Plaintiff's business and operations* were at all times duly disclosed to and known by said Defendant Clowes, and were received and accepted by him in trust . . . to receive and maintain the same only for the benefit of Plaintiff . . ." (Emphasis added.) [p. 2, lines 26-30.]

In light of the foregoing allegation, can it now be successfully contended by Eldon that each and every document relating to the existence of ideas, concepts, developments, sources of supply, manufacturing procedures, marketing information and information relating to costs, are not discoverable? Can it also be successfully claimed by Eldon that documents which disclose the manner and extent to which each of the above items has been maintained in secrecy by other

employees of the company and other persons are not now discoverable? Can it be further contended by Eldon that documents relating to any or all of its business activities are not discoverable, including "each and every facet" of its business activities? Of course, the order granted by the Superior Court is far more restrictive than all of the documents in Eldon's possession that would come within the scope of the foregoing inquiry.

In equating the foregoing allegations of the Complaint with what Eldon claims to be an "unreasonable" search and seizure of its documents through the operation of the Supreme Court's Order, it is clear that the shoe is really on the other foot, and the casting of that shoe is a burden Eldon has imposed upon itself by the sweeping charges and allegations of its own Complaint. As the Court can readily see, the burden cast upon Clowes through the allegations of Eldon's Complaint is unreasonable, and yet, Clowes is caused to test such allegations through, in part, the medium of the documents herein requested and ordered to be produced. As this Court will appreciate, the burden cast upon Clowes and Clowes' counsel in viewing the documents ordered to be produced for the purpose of collating and relating the same to the allegations of the Complaint and of the Cross-Complaint is an expensive, time-consuming, and unwanted task. Yet, Eldon complains herein, as it has to all of the other Courts below, that an unreasonable burden has been placed upon it.

C. Clowes' Sixty Four Page Declaration Filed in Connection With the Superior Court's Order Establishes More Than an Ample Showing of Good Cause.

The Court's attention is invited to the sixty four page Declaration of Clowes filed in support of the Motion to Compel Production of Documents (attached as Exhibit "E" to Eldon's Application for Stay of Execution before this Court), wherein will be disclosed that Clowes, by appropriate Delcaration, has shown good cause for the production of each and every document ordered to be produced by the Superior Court. In this connection, a fair reading of Clowes' Declaration will reflect that Clowes has specifically identified the documents as being in existence from his knowledge of Eldon's business records as its former general manager; has specifically identified persons who would be in possession of such documents, and/or would be signatories to such documents or the recipients thereof; has specifically set forth the relevancy and/or materiality of each class of documents requested to the issues and/or subject matter of the action; and has set forth with particularity what information would, or should, be disclosed through such documents as related to such issues and/or subject matter.

Other than the statement by Eldon on page 10 of its Petition that:

> "Clowes' Motion fails in any way to show good or probable cause for the requested search, and as such constitutes the very type of unreasonable search and seizure intended under the Fourth Amendment to be protected against".

Eldon has made no showing whatsoever to this Court, or any of the Courts below, including the Superior Court, of precisely why good cause for the production of such documents has not been shown by Clowes. Without such a factual showing by Eldon, it is respectfully urged that this Court is without power to determine anew whether or not the Superior Court abused its discretion in granting the Order.

D. The Burden Cast Upon Eldon to Produce the Documents Ordered Produced Is One of Its Own Making.

As stated above, the burden cast upon Eldon is one it must necessarily assume because of the sweeping allegations of its Complaint alleging, in part, that "every fact and facet" of its business activities constitute a protectible interest or trade secret to exclusion of use of the same by Clowes, its former general manager, officer and director.

As is stated above, the Supreme Court of the State of California in *Greyhound Corporation v. Superior Court,* cited above, set forth the parameters controlling the exercise of the discretion of the Trial Court in protecting a person against an unreasonable search and seizure, which might be occasioned through an Order compelling production of documents. The California Supreme Court stated in *Greyhound,* in accordance with off quoted opinions of this Court, that "The California Constitution only prohibits 'unreasonable' seizures. Reasonable searches are permitted. One such 'reasonable' search is by means of a search warrant. But just as search warrants are justifiable on the showing of good cause (and the provision of other protective procedures), so an order for the inspection of material in a civil case is reasonable when similar provision is made." (15 Cal. Rptr. 111).

As also stated above, the California Supreme Court then defines the factors to be employed by the Trial Court in exercising its discretion in granting or denying discovery by stating on Page 103 of 15 Cal. Rptr. as follows:

> "To predicate appellate review on the hypothesis that such an exercise of discretion may not be disturbed, is to overlook the purpose of the discovery statutes. If discovery is to serve its intended purpose, the manner of exercising discretion must be given greater consideration at both the trial and appellate level. Certainly, in some cases, consideration should be given to the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order which may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances. With such considerations in mind, the court may grant the request in full or in part. It may grant subject to specified limitations which it finds proper to impose. And it may, when necessary, deny in toto. . . ."

With the following predications in mind, a review of Eldon's opposing papers to Clowes' Motion to Compel Production of Documents (Exhibit F to Eldon's Application for Stay of Execution to this Court) will disclose that Eldon's presentation to the Trial Court in opposition to Clowes sixty four page Declaration and

the thirty one page Motion itself is almost entirely devoid of specific facts upon which the Trial Court could have, or should have, concluded that the Motion to Compel Production of Documents as modified by Clowes' was an "unreasonable" invasion of Eldon's right against "unreasonable" searches and seizures. Even the Declaration of William Lear, Eldon's counsel and custodian of records, filed in support of Eldon's papers is devoid of specific facts on which the Trial Court in any manner could have rationally concluded that the purported search and seizure of Eldon's documents was in any manner "unreasonable". It is further to be noted from Mr. Lear's Declaration that most of the statements made therein are conclusionary and devoid of factual showing in predication thereof.

Just as importantly, Eldon failed to raise the issue before the Trial Court of the purported "unreasonable" search and seizure of Eldon's documents that would emanate from the operation of the Trial Court's Order. It is also not to be forgotten that the broad sweeping allegations of Eldon's own Complaint are the predication compelling the need for Clowes to seek production of the documents ordered to be produced.

Mr. Lear's Declaration will also disclose an entire void of any showing that the documents requested by Clowes will in any manner involve the purported Trade Secrets of Eldon therein, much less disclosure of such Trade Secrets. In this connection, as stated above, it is Eldon that contends through the allegations of its Complaint that Clowes knows "every fact and facet" of its business activities and then goes on to claim that "every fact and facet" of its business activities constitutes a protectible Trade Secret through exclusion of use

of the same by Clowes. How anomalous a position can Eldon assume? For on the one hand, it says that Clowes' knows all of its Trade Secrets and then on the other hand it advances the contention herein and in the Courts below that disclosure of its Trade Secrets to Clowes is unreasonable.

Eldon also complains herein that the Trial Court abused its discretion in exceeding its jurisdiction ordering Eldon to produce the books, records and correspondence referred to herein for the reason, among others, that such documents include therein Trade Secrets of Eldon. In connection with the Superior Court's purported act in excess of its own jurisdiction, the record below will disclose that Eldon did not advance such a contention until it applied for a Writ of Prohibition to the District Court of Appeal. The California Courts have held that a Writ of Prohibition will not be granted until an objection to jurisdiction has been made and overruled in the Trial Court.

Schaeffer v. The Municipal Court, Santa Barbara Goleta Judicial District, (1968) 67 Cal. Rptr. 479; *Citizens Utilities Co. of California v. Superior Court* (1963), 31 Cal. Rptr. 316.

The Supreme Court of the State of California stated in the *Citizens Utilities* case on page 323 of 31 Cal. Rptr. as follows:

> "This is a rule of practice based on courtesy to lower courts and on the desire to prevent unnecessary litigation. Inasmuch as it is clear that Respondent Superior Court has jurisdiction of the parties and the subject matter and since, as will appear below, there are several possible ways by which it could have properly and adequately exer-

cised that jurisdiction, there is every reason for here following that sound rule. (Citations). It follows, therefore, that had the point now urged before the Appellate Courts been properly placed before the Respondent Superior Court; that Court could have, and we must presume would have, devised a procedure that would have fully protected Petitioner's right to the compensation in question. Petitioner's failure to do so has caused extended and unwarranted litigation in this case and presents an ideal example of the reason for the rule."

The record of proceedings before the Superior Court will also disclose that there was no lack of timely or appropriate opportunity to present an objection to jurisdiction by Eldon. Nor would the record show that if such an objection was made it would have been futile.

IV.

The Denial of a Hearing Before the California Supreme Court Does Not Violate Eldon's Rights to Procedural Due Process.

As the plain facts indicate, Eldon received a fair and impartial hearing before the Superior Court, which, in part, involved a thirty one page written Motion seeking production of documents filed on behalf of Clowes, including a sixty-four page Declaration of Clowes filed in support thereof; Eldon's opposing papers to such Motion consumed twenty three pages, including a four page Declaration of William Lear; [Exs. E and F to Eldon's Motion for Stay of Execution to this Court]; a period of time of more than six months elapsed between the time the Motion to Compel Production of Documents was first filed and the time in which the mat-

ter was finally determined by the Superior Court [Ex. 2 of Clowes' opposition to Application of Eldon for Stay of Execution, p. 13, lines 16-22]. The foregoing illustrates that Eldon received due and ample consideration from the Superior Court of the contentions made herein, at least to the extent that such contentions were before the Superior Court at the time of determination of the Court's Order.

The Court of Appeals for the District of Columbia Circuit has defined due process of law to be as follows, as stated in *Lapides v. Clark,* (1949), 176 F. 2d 619, on p. 620 of 176 F. 2d:

> "The guaranty of due process demands only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained."

(Citing *Nebbia v. New York,* 291 U.S. 502, 525, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469). In turn, this Court denied a Writ of Certiorari relating to the holding of the Court of Appeals in the *Lapides* case (70 S. Ct. 101, 338 U.S. 860, 94 L. Ed. 527) and also denied a rehearing (70 S. Ct. 187, 338 U.S. 888, 94 L. Ed. 545).

In view of the opposition of Eldon advanced to the Superior Court prior to the Court's determination of the Motion of Clowes, as stated above, it is respectfully submitted that in no manner could a reviewing Court assume that the Superior Court acted either unreasonably or arbitrarily or capriciously in rendering the Order herein made. Nor could a reviewing Court have rationally concluded that the documents ordered to be produced by the Court had no substantial relation to

the legitimate discovery rights of Clowes, especially in view of the sweeping nature of the allegations of Eldon's Complaint.

It is therefore the "hearing" or denial thereof at the Superior Court level to which the case cited by Eldon (*Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 304-305, 57 S. Ct. 724, 730, 81 L. Ed. 1093 (1937)) has bearing from which Eldon should not be heard to complain herein.

Additionally, to expand Eldon's logic, as suggested by the contention made on page 13 of its Petition that a denial of a hearing by the California Supreme Court is violative of Eldon's rights to procedural due process, it would also therefor necessarily be contended by Eldon that a denial of the within Petition for Writ of Certiorari by this Court constitutes a denial of Eldon's rights to procedural due process. Yet, it is well known that this Court rejects the vast majority of Petitions for Writ of Certiorari without hearings thereon.

Thus, the record below demonstrates that Eldon was accorded full and fair opportunity in the Superior Court to advance any relevant contention it desired to make in opposition to Clowes' Motion to Compel Production of Documents and that the utmost of due process was accorded to Eldon by the Trial Judge in waiting six months before rendering the Order herein complained of.

V.

The Within Petition, and the Stay of Execution Heretofore Sought by Eldon and Denial in This Court, Constitute Frivolous Acts for Which This Court Should Assess Double Costs and for Which This Court Should Assess Attorneys Fees Against Eldon.

It is respectfully submitted that not only the Petition for Writ of Certiorari herein presented by Eldon, but the Application for Stay of Execution heretofore presented by Eldon, is so devoid of factual or legal merit that it would be clear to Eldon and its counsel that no rational basis could exist for the filing of the within Petition, and the Stay of Execution with this Court.

It is to be noted that not only has Eldon failed to support the within Petition for Writ of Certiorari with relevant factual matter, it has failed to disclose to this Court that the Order compelling production of documents was severely restricted in its scope well beyond the presentation made by Eldon on page 7 of Eldon's Petition. Eldon's failure to disclose to this Court that each of the classes of documents requested by Clowes was limited to six suppliers of Eldon and moreover, was in a great number of instances limited to the years 1966 through Sept. 8, 1969 (rather than January 1, 1962 through March 31, 1969 as represented by Eldon in its Petition) could only have been undertaken by Eldon for the purpose of causing this Court to be deluded into believing that the Order of the Superior Court was overly broad in its application to Eldon.

Such could not be the product of inadvertence either for the reason that Eldon's Petition for Writ of Prohibition to the California District Court of Appeal sets forth in specific detail the precise limitations of the Trial Court's Order to the six suppliers above named and for the periods of time involved (See Eldon's Petition for Writ of Prohibition to the California District Court of Appeal, pages 8, 9, 10, 11, 12, 13, 14, 15 and 16), Exhibit I to Eldon's Application for Stay of Execution to this Court).

Moreover, it is urged that this Court should look to the relative economic capacities of Eldon vis-a-vis of Eldon and Clowes to conduct this litigation. Eldon is a well known publicly funded Corporation, doing in excess of Twenty Million Dollars a year in business as opposed to Clowes, who, as an individual has been stripped of virtually all of his financial resources as a result of the actions of Eldon as are alleged to have occurred in the Cross-Complaint on file in the Court below [Ex. C to Eldon's Application for Stay of Execution to this Court and Clowes' opposition to Application of Eldon for Stay of Execution to this Court (pp. 14, 15 and 16 thereof) and p. 8, lines 5-32, p. 9, lines 1-32, and p. 10, lines 1-14 of Clowes' Memorandum of Points and Authorities in opposition to Eldon's Motion to the Superior Court to Stay Execution of the Court's Order ending the outcome of this Petition for Writ of Certiorari, attached as Exhibit 3 to the exhibits accompanying Clowes' opposition to the Application of Eldon for Stay of Execution to this Court.]

This Court's jurisdiction to tax double costs arises pursuant to the provisions of Supreme Court Rule 57 (7). The Court's jurisdiction to grant Clowes' dam-

ages, including therein attorneys fees incurred by him in this proceeding arises pursuant to Supreme Court Rule 56 (4).

Conclusion.

For the reasons above stated, the Petition for Writ of Certiorari should be denied and the Respondent herein should be awarded double costs and reasonable attorneys fees involved in the preparation of all opposition before this Court to Eldon's Petition.

Respectfully submitted,

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By PAUL HAMILTON,

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